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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 94

FRANK BONETTI, *Petitioner*,

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, ET AL., *Appellees*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit which affirmed a judgment of the United States District Court for the District of Columbia sustaining an order for the deportation of the petitioner.

OPINION BELOW

The opinion of the court below has not yet been officially reported. Copies of the opinion and judgment are annexed hereto.

JURISDICTION

The judgment of the Court of Appeals was issued on December 27, 1956. (R. 46) The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. Code, section 1254(1).

QUESTIONS PRESENTED

1. Whether the statutory provision for deportation of aliens who become members of the Communist Party after "entering" the United States applies to the petitioner, who entered the country for the first time in 1923, was a member of the Communist Party from 1932 to 1936, left the country in 1937 giving up his residence and all rights to return, and entered the country again as a new immigrant in 1938, at which time after a hearing in which he acknowledged his past membership in the Communist Party, he was adjudicated admissible and admitted for permanent residence and has not since been a member of the Communist Party.

2. Whether deportation under the above circumstances and on a record which used against the petitioner the testimony he gave at the hearing at which he was adjudicated admissible, violates due process of law.

3. Whether the statute providing for the deportation of aliens for past membership in the Communist Party is unconstitutional on its face or as applied to the facts in this case.

STATUTE INVOLVED

Section 22 of the Internal Security Act of 1950 provides in part as follows:

"That any alien who is a member of any one of the following classes shall be excluded from admission into the United States:

* * * * *

(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:

* * * * * *

Section 4 of the aforesaid Section 22 provides in part:

"(a) Any alien who was at the time of entering the United States, or has been at any time thereafter, . . . a member of any one of the classes of aliens enumerated in Section 1(2) of this Act, shall upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States."

This statute was carried forward by Section 241(a)(6)(c) of the Immigration and Nationality Act of 1952, 8 U. S. Code, section 1251(a)(6)(c), providing:

"Any alien in the United States . . . shall upon the order of the Attorney General, be deported who . . . is or at any time has been, after entry a member of the following classes of aliens: . . . Aliens who are members of the . . . Communist Party of the United States."

STATEMENT OF THE CASE

The petitioner is an alien who was born in France, of Italian parentage. He is 49 years of age. He first entered the United States in 1923 at the age of 15. During this period of residence he was a member of the Communist Party for the period 1932 to 1936.

During the period of his membership, he understood the "principles of Communism" to consist of a belief in public ownership of the means of production and did not believe that the Communist Party stood for the forceful overthrow of the American government. He left the country in 1937, to fight for the Spanish republic against the Franco rebellion, thereby giving up any rights he had for permanent residence which he had acquired as a result of his admission to this country in 1923 (R. 7-8, 13, 25-26, 28-35).

Petitioner returned to this country in October 1938, and again applied for admission as an immigrant alien. A hearing on this application was held before a Board of Special Inquiry, and at the hearing the petitioner testified that he had been a member of the Communist Party of the United States for the period 1932 to 1936. The Board of Special Inquiry recommended against his admission, but on appeal the petitioner was admitted for permanent residence a second time (R. 8, 12, 13, Exhs. 8, 9, 11).[1] The petitioner left the country for one day and reentered in the summer of 1939. (R. 13)

In 1942 the petitioner married a native-born American citizen and became the stepfather of her two American-born children. He applied for naturalization in 1943. In 1944 and again in 1946, he was interviewed in connection with the application and again testified fully to his past membership in the Communist Party during the period 1932 to 1936. (Exhs. 5, 6, R. 25-39) His application was not further processed by the Service.

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[1] The notation "Exh." refers to exhibits introduced at the deportation hearing.

The petitioner has not been a member of the Communist Party at any time since 1936,[2] or since his entry into the United States and his admission for permanent residence in 1938. (R. 12-13; Exhs. 4, 5, 6, 8, 9). He was, nevertheless, ordered deported on the ground of his past membership in the Communist Party. The sole evidence of this past membership consisted of the petitioner's own testimony before the Board of Special Inquiry at the time of his application for admission as a permanent resident in 1938, his alien registration form (Exh. 4), and the statements given in interviews in connection with his application for naturalization.

The petitioner sued in the United States District Court for the District of Columbia, challenging the validity of the deportation order and requesting that it be set aside. (R. 2-4). The trial court held that the statute authorized the deportation of the petitioner because of his past membership in the Communist Party during his first period of residence in the country, and granted judgment for the Attorney General (R. 8-9). The Court of Appeals affirmed (R. 43-46).

REASONS FOR GRANTING THE WRIT

1. This case involves an important and constantly recurring problem as to the proper construction to be given to Section 22 of the Internal Security Act of 1950 and Section 241(a)(6)(C) of the Immigration and Nationality Act of 1952. These acts provide that an alien may be deported for membership in the Communist Party "after entry." We contend that this

[2] The petitioner in one of his statements stated that he quit the Communist Party in the spring of 1937, but the Immigration Service found that he had been a member from 1932 to 1936 (R. 13, 15).

term must be limited to an alien's last entry, or, at a minimum, to his last entry for permanent residence. The government contends, and the court below agreed, that the term entry as used in the statute means any one of an alien's several entries. Certiorari should be granted so that this Court may resolve this important question of statutory construction.

The construction of the statute urged by the government is contrary to the basic scheme of the immigration laws and to the interpretation of the term "entry" previously given by this Court. The construction is also in conflict with the canons of statutory construction of deportation laws as laid down by this Court and with the construction given the statute by the Fifth Circuit. Moreover, the construction given the statute by the court below brings about an arbitrary and unreasonable result.

(a) The basic scheme of the immigration laws demonstrates that Congress did not intend, for the purposes of determining deportability, to go behind a basic entry at which the rights of an alien to be admitted were adjudicated, as in the case of the petitioner here. Section 241(a) of the Immigration and Nationality Act, 8 U.S.C. section 1251(a)[3] lists the classes of aliens who are deportable. The first two classes are aliens who were at the time of their entry excludable in accordance with the laws existing at the time of entry, and aliens who entered the United States without inspection or in violation of some law. The remaining classes of deportable aliens are deport-

[3] For purposes of convenience, we deal with the Immigration and Nationality Act of 1952, which codified pre-existing immigration statutes, rather than with the welter of amended and re-amended pre-existing legislation.

able for their conduct after entry. If an alien has satisfactorily overcome the obstacles to admission, his future status in the country is determined by his conduct subsequent to entry. If he leaves the country, he is subject on return to all current exclusionary rules, even though they were adopted after his prior entrance. But if the alien stays physically put within the country, he does not run the exclusion gauntlet over again. Under this general scheme, the only relevant entry is the last entry at which time the alien satisfied all the requisites for admission.

When Congress wished to depart from this general scheme, it specifically so provided. Thus category (13) of section 241(a) provides for the deportation of aliens who "prior to, or at the time of *any* entry or at any time within five years after *any* entry, shall have knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law." Thus Congress did distinguish between "after entry" and "after any entry". When it wished to have a deportation provision apply to *any* entry, it said so expressly. The only fair inference is that where Congress merely said "entry," it did not mean "any entry," but meant only the last entry, or at least the last entry for permanent residence. "When Congress has the will it has no difficulty in expressing it . . . When Congress leaves to the judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Bell v. United States*, 349 U.S. 81, 83.

(b) This interpretation of the statute is the only interpretation consistent with prior decisions of this Court applying the principle of "entry." In all previ-

ous decisions in which this Court has considered the consequences that flow as a result of the determination of the date of an alien's "entry" into the United States; it has uniformly held that the alien's status must be determined as of the time of his last entry (or, if he is seeking admission, of the last proposed entry). *Lapina* v. *Williams*, 232 U.S. 78; *Lewis* v. *Frick*, 233 U.S. 291; *United States ex rel Volpe* v. *Smith*, 289 U.S. 422; *United States ex rel Claussen* v. *Day*, 279 U.S. 298; *United States ex rel Stapf* v. *Corsi*, 287 U.S. 129; *United States ex rel Mezei* v. *Shaughnessy*, 345 U.S. 206.

The rationale for these decisions is that each time an alien voluntarily leaves the United States and seeks to return, he is being admitted only by the grace of Congress, and is subject to the same restrictions as an alien seeking entry for the first time. *United States ex rel Mezei* v. *Shaughnessy*, *supra*. His residence permission is wiped out, and on reentering he is in the same status as a newcomer. *United States ex rel Volpe* v. *Smith*, *supra*, at 426; *Lewis* v. *Frick*, *supra*, at 297.

It being the theory of the immigration statutes that a reentering alien is a newcomer, whose status is determined as of the time of his last entry, it cannot be consistently held in this case that petitioner's status is determined by reference to his first entry. The term "entry" in immigration law is a technical word of art. *Barber* v. *Gonzales*, 347 U.S. 637; *Mangoang* v. *Boyd*, 205 F. 2d 553, 556. And in *Gonzales* v. *Barber*, 207 F. 2d 398, 402, aff'd *Barber* v. *Gonzales*, *supra*, the court rebuffed an attempt by the Immigration and Naturalization Service to manipulate the term "entry" so as to justify a deportation, by stating:

"The meaning of a term used in a statute cannot mean one thing for one situation and something else for a different situation else the law would not have that reasonable certainty which the people have a right to expect." And in *United States* v. *Neelly*, 115 F. Supp. 615, 625, aff'd sub nom. *United States* v. *Sahli*, 216 F. 2d 33, the court disapproved of the government's position that in any particular case it could pick *any* entry which would support deportability.

The government argued below, and the court agreed, that since the term "entry" is defined in the Immigration and Nationality Act of 1952 as "any coming of an alien into the United States, from a foreign port or place" 8 U.S.C. Sec. 1101(a)(13), the term "entry" as used in sec. 241(a)(6)(C) refers to "any entry," that is, to an entry "at any time." This is clearly a non sequitur.

In the first place, this definition was copied verbatim from the decision of the Supreme Court in the *Volpe* case *supra*. It is clear from that decision that the phrase "any coming" was used *qualitatively*, as meaning a coming *of any kind*, as whether for permanent residence, as a visitor, as a seaman, or in transit, or even illegally. This is all that the definition of "entry" implies. It has nothing to do with which of several entries is the critical entry for deportation purposes. It is a distortion of the legislation to treat a definition of the *kind* of coming as dispositive of *which* particular coming is referred to in other sections. All that the definition proves is that the petitioner's coming in 1923 was *an entry* under the Act. Of that there is no question. But this does not resolve the problem posed in this case as to whether or not it was *the entry* upon which the petitioner's status must be deter-

mined. We submit that on the basis of the statutory scheme of the deportation section, the use by Congress of the word "entry" rather than "any entry," the manner in which the term "entry" has previously been defined by this Court, the fact that Congress used the term "any entry" when it meant "any entry," and the canons of statutory construction for deportation statutes, see *infra*, all compel the conclusion that the dispositive entry was petitioner's 1938 or 1939 entry, and not the entry of 1923.

(c) The construction given the statute by the court below is inconsistent with the construction given a similar provision of the Immigration and Nationality Act by the Fifth Circuit in *Berrebi* v. *Crossman*, 208 F. 2d 498. In that case, the court set aside a deportation order which had been based upon past membership in the Communist Party in a foreign country prior to the alien's admission into the United States. The court stated (at 499):

> "It is not only significant, but very persuasive, that the petitioner was lawfully admitted into the United States. At the time he presented himself for admission, the standards to be met were very strict. The stipulation compels us to conclude that the petitioner met all the requirements when he was lawfully admitted. Even though the past misconduct of an alien might have justified his exclusion at the time of his application for admission, the fact that he was lawfully admitted, and lived a law-abiding life in this country thereafter, brings him within the different classification provided by law for an alien sought to be deported."

(d) The construction given by the statute below was inconsistent with the canon of construction for deportation statutes laid down by this Court. Immi-

gration statutes are to be narrowly construed, and since deportation is an extreme penalty, the statute is to be construed in favor of the alien. *Barber* v. *Gonzales*, *supra*; *Tan* v. *Phelan*, 333 U.S. 6; *Delgadillo* v. *Carmichael*, 332 U.S. 388. In *Tan* v. *Phelan* this Court said at 10:

> "We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile, Delgadillo v. Carmichael, 332 U.S. 388. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.

In addition, as we show below, the interpretation of the statute urged by the government and sustained by the court below, raises serious constitutional questions and brings about an arbitrary and unreasonable result. Under accepted canons of construction, the statute should be interpreted so as to avoid any constitutional questions (*United States* v. *C.I.O.*, 335 U.S. 106, *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481) and arbitrary and unreasonable results (*United States* v. *Katz*, 271 U.S. 354; *United States* v. *American Trucking Association*, 310 U.S. 534).

(e) The construction of the statute adopted by the court below and urged by the government causes a harsh and unconscionable result. Surely it is a breach of governmental faith to expel an alien for a cause which he divulged on seeking entry and which was

held not to exclude him. With full knowledge of petitioner's former connection with the Communist Party, the government decided that he was fit to reside in this country. That decision caused him to shape his life, take an American spouse, and otherwise fix his roots here. It shocks the conscience that petitioner should now be told that the cause which did not disqualify him from entering and residing in the country has somehow become a reason for disrupting his life and that of his family.

The breach of governmental good faith is magnified by the fact that the deportation order is based upon the testimony of the alien in his entry proceeding. Expulsion of the petitioner on these facts is so arbitrary that it violates due process of law. As stated in *Rochin* v. *California*, 342 U.S. 165, 173, due process prohibits governmental "conduct that shocks the conscience" or "offends the community's sense of fair play and decency."

2. This case also raises the important question of the constitutionality of the provision under which the petitioner was deported, Section 22 of the Internal Security Act of 1950. This issue is presently pending before this Court in the case of *Rowoldt* v. *Perfetto*, No. 34 this Term.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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